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## INTERESTS OF PERSONALITY

[*Concluded*]

### 5. HONOR: REPUTATION <sup>70</sup>

WHAT might be called inviolability of the spiritual person is of no less importance, although much more difficult to secure legally. Men will fight in defense of their honor no less than in defense of their physical persons. Hence the most elementary of social interests, the interest in general security, demands that the one individual interest be secured no less than the other and for much the same reasons. The exaggerated importance of individual honor in primitive and in pioneer society illustrates this. In a condition of feeble law adequate securing of this interest, which is difficult to secure through law under any circumstances, is quite impossible, and the insistence of the individual on protecting and vindicating it for himself becomes a serious menace to the peace and order of society.

In determining the nature and extent of the individual interest in honor it is important to distinguish this interest from the individual interest in reputation as a part of one's substance or, in

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<sup>70</sup> Westermarck, *Origin and Development of the Moral Ideas*, ch. 32; Post, *Ethnologische Jurisprudenz*, II, §§ 17, 103; Binding, *Die Ehre und ihre Verletzbarkeit*; Hess, *Die Ehre und die Beleidigung*; Eiselen, *Wesen und Wert der Ehre*; Sandoz, *De la protection du point d'honneur*; Bosc, *Essai sur les éléments constitutifs du délit civil*, 206 ff.; Bower, *Code of Actionable Defamation*, app. iii. I am indebted to Professor E. R. Thayer for many suggestions in connection with this section.

other words, as an asset. Lord Holt, in an action for malicious prosecution, said that one might maintain such an action for any of three sorts of damage: (1) "damage to the fame, if the matter whereby he is accused be scandalous"; (2) injury to his person by imprisonment; and (3) injury to his property by putting him to cost and expense unlawfully.<sup>71</sup> The second is obviously an infringement of an interest of personality. The first may involve personality or substance, or both. It has been argued, however, that only the latter is involved. Thus Bower says:

"It may be granted that reputation in many respects differs from other forms of property and connotes certain ideas involved in the notion of 'person' or 'personality,' for . . . it is certainly a very special and strictly personal type of asset: it has some analogies, no doubt, to the right of the individual to his life, his limbs, or his liberty, which are all only 'property' in a somewhat metaphorical sense. . . . In so far, however, as individual honor, dignity, character, and reputation are recognized by the law as proper subjects of its protection and as being such that any injury thereto entitles the aggrieved party to the same forms of legal redress as the invasion of property strictly so called, it is permissible to consider these rights as assets, though assets of a somewhat peculiar description."<sup>72</sup>

As to the proposition that the mode of legal redress for infringement of the right of reputation is the same as that employed for infringement of rights of property, it is enough to say that exactly the same mode of redress, — namely, an action on the case for damages, — is employed for any infringement of the right of physical or corporal integrity by an indirect injury. The point must be, therefore, that the interest, so far as the law recognizes it as a proper subject for protection, is essentially one of substance. Our law of defamation, a somewhat haphazard growth, representing the needs and the ideas of more than one time, does not admit of any rigorous analytical treatment. Historically it is quite false to treat the subject from the standpoint of a securing of interests of substance only. Analytically, if one takes the law as it is, much

<sup>71</sup> *Savill v. Roberts*, 12 Mod. 208 (1692).

<sup>72</sup> *Code of Actionable Defamation*, 275-276. Cf. the Oriental's view of the Englishman: "Is a man sad? Give him money, say the Sahibs. Is he dishonored? Give him money, say the Sahibs. Hath he a wrong upon his head? Give him money, say the Sahibs." Kipling, *Dray Wara Tow Dee*, In *Black and White* (Outward Bound ed.), 4.

of it is consistent with Bower's theory, though, as will be seen presently, if we accept his view, there are logical anomalies from the standpoint of such a theory which proceed from recognition that an interest of personality is involved. The law of the non-English-speaking world recognizes an interest in honor as an interest of personality. Moreover, one's claim to a social and spiritual life is as clear as his claim to physical life. The respect of his fellows may be an asset, as his power to labor may be an asset. But in each case the highest and most real value may attach to the integrity of the spiritual person rather than to the power of economic employment. This may be true especially of economic employment of the confidence and regard of one's fellows. If securing the individual in his interest in maintaining his dignity and his honor, as parts of his personality quite as dear to him as the integrity of his skin, is dependent on the possibility of pecuniary assessment, it must be because of some inherent difficulty in securing such an interest legally, and not because the interest itself is essentially one of substance. If the two interests are closely connected, it is the more necessary to insist that they are fundamentally distinct. On the one hand there is the claim of the individual to be secured in his dignity and honor as part of his personality in a world in which one must live in society among his fellow men. On the other hand there is the claim to be secured in his reputation as a part of his substance, in that in a world in which credit plays so large a part the confidence and esteem of one's fellow men may be a valuable asset.

Many problems turn on the nature of the interest secured. Thus a juristic person can have interests of substance only. Hence defamation of a juristic person is only cognizable so far as the reputation of the association is an asset and is injuriously affected as such.<sup>73</sup> Again, the much discussed question of use of the name of an actual person in fiction requires similar distinctions. It may be, as in the well-known case of "Cape Cod Folks" in its original form, that actual individuals are so described by their own names or by what are substantially their own names as to be made ridiculous to their neighbors and subjected to contempt and humiliation. Here the interest of honor is involved. On the other hand it may be that the claim amounts to no more than one of prop-

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<sup>73</sup> *Oram v. Hutt*, [1913] 1 Ch. 259.

erty in the name, which its bearer seeks to hold inviolate from any use by authors, even though no reference to him personally is made or suggested. As no such interest of substance, where the name has no value as property, is recognized, the claim ought to fail. Between the two are cases where the interest is one of personality analogous to that secured by the so-called right of privacy. A sensitive person may be disturbed mentally because he chances to have the same name as a character in a popular novel. But he might chance to have the same name as a murderer or as a notorious criminal and might be annoyed by the "chaffing" to which the coincidence subjected him. As has been seen in another connection, the law cannot be asked to protect sensitiveness to this extent.<sup>74</sup> One may have an odd or unusual name and so the coincidence may be striking. But there are obvious interests of great weight to be balanced against the individual interest here, and these, along with difficulties involved in the attempt to secure it by law, are decisive. Such cases, therefore, must come on the one side to an interest in substance, — and it is obvious that property in the name cannot be asserted in these cases, — or on the other side to infringement of an interest of honor by the humiliation of direct personal reference or obvious description of the individual.<sup>75</sup> Another point which requires the same distinction is the common-law doctrine as to publication, that is, the requirement that the defamatory matter be uttered or made known to some person other than the one defamed. As Bower says justly, this is "a corollary from the notion of reputation as property. . . ." <sup>76</sup> Hence in the Roman law and in the law of continental

<sup>74</sup> Compare the case of defamation of the dead. "Damages will be given a man who is calumniated in his lifetime *because he may be hurt in his worldly interests*. . . . But the law does not regard that uneasiness which a man feels in having his ancestor calumniated. That is too nice. . . . If a man could say nothing against a character but which he could prove, history could not be written." Boswell, *Life of Dr. Johnson* (Birrell's ed.), IV, 25-26, quoted by Bower, *Code of Actionable Defamation*, 282. When the group of kindred were a recognized unit whose interests the law endeavored to secure, such a question might have been looked at otherwise. The honor of the kindred as a group might be involved. Now that the individual is the unit, the only interest is one in the mental comfort of the individual, which is obviously outweighed by the social interest in the free writing of history.

<sup>75</sup> See *Smith, Jones v. Hulton*, *Three Conflicting Judicial Views as to a Question of Defamation*, 60 *Univ. of Pa. Law Rev.* 365, 461, especially the French case in the appendix, 479.

<sup>76</sup> *Code of Actionable Defamation*, 294.

Europe, where the interest in honor, as an interest of personality, is regarded as well as the interest of substance, the requirement of publication does not obtain.<sup>77</sup> This is true also in Scotland, where the Roman view is followed.<sup>78</sup> That attempts to deal with this whole matter on the sole basis of an interest of substance err in omitting an important element is suggested by the struggle of courts to find publication in cases which obviously call for relief yet do not involve publication except in a strained sense.<sup>79</sup>

How far has the interest in honor, as an interest of personality, been recognized by legal systems in the past? How has legal recognition of this interest developed? Primitive law, it will be remembered, treated all injuries to personality as injuries to the honor of the person injured. In other words, the only, or at least the chief, individual interest which it recognized was the interest of the freeman in his honor. Even property interests were treated from this standpoint in early law. For example, in the Roman law originally, an injury to another's slave, if actionable, was actionable on the ground of insult to the owner.<sup>80</sup> Systematic liability for injury to property as such came into the Roman law in the third century B.C. The primitive tendency was to treat all wrongs as injuries to personality, and all injuries to personality as insult. As has been seen, *iniuria*, which originally means "insult," was used in Roman law to designate all infringements of the interest of personality. But as they distinguished the interests involved, jurists came to recognize three different forms or types of *iniuria*. Those of the first type were called real injuries, that is, injuries to the physical person. Here, although the interest was originally regarded as one of honor, the law soon came to see that in truth it was an interest in body and life, in other words, an interest in the physical person. For such injuries the Roman law finally provided a pecuniary recompense to be fixed by the tribunal in view of the character of the injury and of the circumstances of the case, or in the older civil law of modern Europe honorable amends in the form of such apology as the

<sup>77</sup> Gaius, III, § 220; Dig. XLVII, 10, 5, § 9. See references in n. 70, *supra*.

<sup>78</sup> Bower, Code of Actionable Defamation, 463.

<sup>79</sup> *Delacroix v. Thevenot*, 2 Starkie 63 (1817); *Seip v. Deshler*, 170 Pa. 334, 32 Atl. 1032 (1895); *Fonville v. McNease*, Dudley Law (S. C.) 303 (1838); *Schmuck v. Hill*, 2 Neb. Unoff. 79 (1901).

<sup>80</sup> Dig. XLVII, 10, 15, § 35.

tribunal might require. Injuries of a second type are called symbolic injuries, that is, injuries to the honor or, as the Roman books said, to the dignity of the person. Examples of symbolic injuries are insulting words addressed to the person, insulting gestures, and the like. Here the injury is to the feelings of the complainant and the interest is an interest in his honor. In these cases the remedy might be a sum of money assessed by the tribunal as before, or in the older law of modern Europe it might be honorable amends. Injuries of the third type were called pecuniary injuries, that is, injuries to reputation, to credit, to social or business standing. Here there is injury to an interest of substance. In this case the remedy is reparation of the damage by such a sum of money as will compensate the person injured.<sup>81</sup>

In the new German code the matter is made very clear. Following the Roman law, the code requires intent to injure in the case of symbolic injuries. Where the injury is purely to the honor of the person there must be an intentional insult or intentional defamation. Here the remedy is a sum of money fixed in view of all the circumstances as in Roman law or publication of the judgment at cost of the wrongdoer.<sup>82</sup> But if an untrue statement is made which is likely to injure the credit of the complainant or to injure his earning power, the German code makes the person who utters the defamatory statement liable at his peril for what he might have discovered by the exercise of diligence. In such a case, however, the only remedy is reparation for the actual pecuniary loss.<sup>83</sup> Thus the code recognizes that in this case the interest secured is an interest of substance, while in the former case it is an interest of personality. In truth our own law subconsciously recognizes something very like this in providing for punitive damages where there is a wanton wrong and limiting liability to actual damages in other cases. One should compare also the rule in slander requiring special damage, which amounts to requirement of injury to an interest of substance, except where the defamatory matter affected interests of substance on its face or contained a charge of crime involving corporal punishment by way of penalty and so endan-

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<sup>81</sup> Salkowski, *Institutionen des römischen Rechts*, § 154; De Villiers, *The Roman and Roman Dutch Law of Injuries*, 24.

<sup>82</sup> German Penal Code, § 188; Schuster, *German Civil Law*, § 288.

<sup>83</sup> Schuster, *German Civil Law*, § 288.

gered liberty and infringed an interest of personality in the days of hearsay presentments by grand juries.<sup>84</sup>

Next we may ask, How far is this interest, as one of personality, protected by law to-day? The extent of protection in the law of continental Europe has been indicated already. In our law the exigencies of the remedy and of the mode of trial have imposed certain restrictions, so that except as the interest in honor is protected by what have been called "parasitic" damages, it is for the most part regarded as one of substance only. But those who argue that the common law always treats reputation as an asset are compelled to recognize certain cases in which the law does not follow out the theory consistently. For example, in case of a wanton, intentional wrong the plaintiff may recover punitive damages in almost all jurisdictions. In this way juries are enabled to deal with cases of infringement of the interest of personality where actual damages, appropriate only to infringements of interests of substance, would afford no security. Another case, regarded by Mr. Bower as an anomaly, he states thus:

"In cases where there is no plea of defeasible immunity, and where, consequently, it is not material for the purpose of establishing such plea, or rather for the purpose of negating any case of malice set up by the plaintiff, to prove good faith on the part of the defendant, such proof will nevertheless justify a mitigation of the penalty which would otherwise be inflicted on the defendant, and this, of course, involves a diminution of the compensation to be awarded as the value of the plaintiff's reputation."<sup>85</sup>

From the standpoint of reputation as an asset, as Mr. Bower says, the foregoing rules are "strictly speaking illogical." The second seems to result from an idea that the damages here are a punishment. Indeed a penalty inflicted on the wrongdoer may

<sup>84</sup> See the old refinements on this point in Bacon, Abridgment, Slander, B. Where the words import a contagious disease and so affect social relations or are prejudicial to one in his office or calling, interests of substance are involved on the face of the defamatory statements.

<sup>85</sup> Bower, Actionable Defamation, 285. Mr. Bower states as a third "anomaly" that "in support of a plea of justification the defendant may give evidence of facts tending to show not merely that the plaintiff in fact had no reputation to lose, but that his conduct has been such that he ought to have had none." *Id.*, 284. If this is a sound statement of the law, the result is out of accord with the theory of reputation as property only. But it seems without warrant in the authorities. *Thompson v. Nye*, 16 Q. B. 175, 180 (1850). See Wigmore, Evidence, I, §§ 79, 280.

well be the only practicable mode of vindicating the interests of personality of the wronged. The law of continental Europe proceeds chiefly in this way, although history has played a large part in the result, since the Roman actions *ex delicto* were penal.<sup>86</sup> It is possible that the second of the two supposedly anomalous cases may rest also upon a social interest that cranks and zealots speak their minds freely. But the latter explanation is hardly consistent with the doctrine of reputation as property, since it allows private property to be destroyed without compensation to effect a remote and conjectural public good.

Two points seem open to criticism in the treatment of defamation in the common law. One is the attempt to reach a definite measure of actual money compensation where the injury is purely to the honor or dignity of the person injured, on the theory that even here the interest secured must be treated as one of substance. In these cases the jurisdictions which do not permit punitive damages, but purport to require a limitation of recovery to actual damages,<sup>87</sup> attempt the impossible; and it may be questioned whether the common law does not in like manner attempt the impossible when it attempts an assessment of actual damages for mental anguish, mental suffering, and the like. As has been said, actual compensation in money is possible only where the injury is to an interest of substance. The attempt in our law to reach an absolute measure of damages in these cases grows out of the exigencies of trial by jury, and the margin of discretion in the jury in assessing damages in such cases hides the breakdown of the academic rules as to the measure of damage which are laid down in the charge of the court. The other point in which our law is open to criticism, — namely, our failure to extend preventive remedies to secure interests of personality, — has been discussed elsewhere.<sup>88</sup> It should be said, however, that practical considerations and the necessity of taking account of other interests make it peculiarly difficult to give adequate security to the individual interest in honor. So far as feelings and mental comfort are involved, all that has been said heretofore applies fully.<sup>89</sup> In addition, very important

<sup>86</sup> Liszt, *Deutsches Strafrecht*, 11 ed., §§ 95 ff.

<sup>87</sup> Massachusetts, Michigan, New Hampshire, Colorado, Nebraska, Washington. See Sedgwick, *Damages*, 9 ed., I, § 358.

<sup>88</sup> See *supra*, p. 362, particularly n. 62.

<sup>89</sup> See *supra*, pp. 362-365.

social interests in free speech, free criticism, and free confidential communication have to be weighed against the individual interest. These social interests will be considered in another connection.

## 6. BELIEF AND OPINION <sup>90</sup>

As an individual interest, the claim of the individual to believe what his own reason and conscience dictate and approve, and to express freely the opinions involved in such belief, is closely connected with the interest in the physical person. With good reason Spencer deduces it as a sort of free mental motion and locomotion.<sup>91</sup> But it is also closely connected with a social interest in free belief and free expression of opinion as guarantees of political efficiency and instruments of social progress. Except as interference with free belief and free expression of opinion takes the form of interference with freedom of the physical person, it is probable that the social interest is the more significant. In our bills of rights, however, individual free speech is always guaranteed, as an individual natural right.<sup>92</sup> In other words, we have been accustomed to treat the matter from the standpoint of the individual interest. Undoubtedly there is such an interest, and there is the same social interest in securing it as in securing other individual interests of personality. The individual will fight for his beliefs no less than for his life and limb and for his honor. Hence the social interest in general security is involved in any interference with the former as well as in interference with the two latter. Moreover, free exercise of one's mental and spiritual faculties is a large part of life. As civilization proceeds it may become the largest part. No one who is restrained in this respect may be said to live a full moral and social life. Thus the social interest in the moral and social life of the individual is also involved.

Recognition of the individual interest in free belief and opinion is relatively recent both in law and in morals. Nor is this interest

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<sup>90</sup> Pollock, *Essays in Jurisprudence and Ethics*, 144-175; Mill, *On Liberty*, ch. 2; Stephen, *Liberty, Equality, Fraternity*, ch. 2.

<sup>91</sup> Justice, §§ 73, 76.

<sup>92</sup> The usual form is: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." N. Y. Const. (1821), art. vii, § 7.

everywhere recognized by public opinion. Press reports from time to time remind us that Mormon elders who preach nothing but the abstract doctrines of their faith are not always safe in every part of the country. Courts are frequently called upon to protect new, queer, or out-of-the-way sects from persecution by otherwise law-abiding communities.<sup>93</sup> Active intolerance of religious, economic, and sociological opinions not generally held by the community is common enough. *Lehrfreiheit* often has to be insisted upon against a strong popular feeling. But this feeling may have an important social interest behind it. For the individual interest in free belief and opinion must always be balanced with the social interest in the security of social institutions and the interest of the state in its personality. These interests may or may seem to require repression of forms of belief which threaten to overturn vital social institutions or to weaken the power of the state. In one way or another, moralists generally recognize some such qualification of the so-called natural right of free belief and free speech.<sup>94</sup>

Historically, much that appears to be lack of recognition of the individual interest in free belief and opinion is rather an over-insistence upon the countervailing interest of the state in its personality or over-insistence upon the social interest in the security of some particular social institution. Almost all state persecution so called and most ecclesiastical persecution is to be explained in this way.<sup>95</sup> Moreover, this interest extends only to belief and opinion. When belief and opinion are put into action, limitations which apply to other action may well apply. For example, prose-

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<sup>93</sup> *Commonwealth v. Arndt*, 2 Wheeler Crim. Cas. 236 (Pa.) (1802). Cf. *In re Frazee*, 63 Mich. 396 (1886); *Figg v. Hanger*, 4 Neb. Unoff. 792 (1903); *Beatty v. Gillbanks*, 15 Cox C. C. 138 (1882).

<sup>94</sup> Spencer, Justice, § 79; Paulsen, Ethics (Thilly's trans.), 698 ff.; Mill, On Liberty, ch. 2 (beginning). See Woolsey, Political Science, I, 272-274.

<sup>95</sup> For recent examples see the federal law as to alien anarchists, *Turner v. Williams*, 194 U. S. 279 (1904); also the Massachusetts red-flag law: "No red or black flag and no banner, ensign, or sign having upon it any inscription opposed to organized government, or which is sacrilegious, or which may be derogatory to public morals shall be carried in parade within this commonwealth." Mass. Acts & Resolves, 1913, ch. 678, § 2. See *Commonwealth v. Karvonen* (Mass.), 106 N. E. 556 (1914). As to the conditions arising from the considerable alien population in large cities which may require such legislation, see Train, Courts, Criminals and the Camorra, ch. 9.

cutions of polygamy were not prosecutions of belief or opinion as to plural marriage, but prosecutions of the act of plural marriage based upon a social interest in marriage as a social institution.<sup>96</sup> Again, the legal system ought not to interfere in any way with the views of persons who believe in healing by faith. But if these are carried into action in the form of neglect to provide for proper assistance to dependents or neglect to report contagious diseases, a countervailing social interest in proper care for dependents and in the general health as a part of the general safety may have to be considered and may be decisive.<sup>97</sup> A similar balancing of interests was behind the distinction which the books used to make between heresy and blasphemy.<sup>98</sup> The former has to do solely with belief and opinion. The latter may be a manifestation of the former. But if it goes further and actively disturbs the public peace or shocks the moral feelings of the community, social interests must be weighed over against the individual interest. The foregoing considerations apply also to political opinion. Under some circumstances the interests of the state in its personality may have to be weighed against the individual interest in free political belief and free expression thereof. This may mean that the social interest in the free development of the individual must be weighed with the social interest in the state as a social institution. Where men live congested in large cities, especially where there are great numbers subjected to severe economic pressure who are more or less ignorant of the local political institutions and more or less ignorant of the language in which the law is expressed, the danger of mobs, which are controlled by suggestion, may require confining of free expression of political opinions on certain subjects to times and places where such things may be discussed without grave danger of violence and disorder.<sup>99</sup>

<sup>96</sup> *Reynolds v. United States*, 98 U. S. 145 (1878); *Davis v. Beason*, 133 U. S. 333 (1890); *Wooley v. Watkins*, 2 Idaho 555, 22 Pac. 102 (1889).

<sup>97</sup> *People v. Pierson*, 176 N. Y. 201, 68 N. E. 243 (1903); *Reg. v. Downes*, 13 Cox C. C. 111 (1875). A good discussion of this matter from the standpoint of ethics may be found in Pollock, *Essays in Jurisprudence and Ethics*, 168-169.

<sup>98</sup> *State v. Chandler*, 2 Har. (Del.) 553 (1837); *Commonwealth v. Kneeland*, 20 Pick. (Mass.) 206 (1838).

<sup>99</sup> Several interests may enter into consideration in such cases, *e. g.*, the social interest in general security, *People v. Most*, 171 N. Y. 423, 64 N. E. 175 (1902) (publications inciting to murder); the social interest in security and good order in public places, *Fitts v. Atlanta*, 121 Ga. 567, 49 S. E. 793 (1905) (public meeting on the

Probably for other reasons, to be considered in another connection, it is impossible to deal legally with belief, which is an internal matter, so long as it is not manifested externally. As the law is a practical institution, it can deal only with acting, not with subjective states in and of themselves. But the manifestations of belief, as, for instance, in the case of political opinions adverse to the right of the federal government during our Civil War to coerce the states in rebellion, may so affect the activities of the state necessary to its preservation as to outweigh the individual interest or even the social interest in free belief and free speech.<sup>100</sup>

*Roscoe Pound.*

HARVARD LAW SCHOOL.

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streets); *Anderson v. State*, 69 Neb. 686, 96 N. W. 149 (1903) (distribution of handbills on the street; in this case the social interest in general security was also involved through the danger from fire in a city); *Mashburn v. Bloomington*, 32 Ill. App. 245 (1889) (Salvation Army); *Commonwealth v. Plaisted*, 148 Mass. 375, 19 N. E. 224 (1889) (Salvation Army); the social interest in general morals, *State v. McKee*, 73 Conn. 18, 46 Atl. 409 (1900) (paper devoted to narration of crimes); *State v. Van Wye*, 136 Mo. 227, 37 S. W. 938 (1896) (paper devoted to scandal).

<sup>100</sup> *Ex parte Vollandigham*, 1 Wall. (U. S.) 243 (1863). See also the opinion of Leavitt, J., *Trial of Vollandigham* (Cincinnati, 1883), 265 ff.